

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

**Verizon Telephone Companies
Petition for Forbearance from
the Current Pricing Rules for
the Unbundled Network Element
Platform**

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Docket No. WC 03-157

**REPLY COMMENTS OF THE NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE**

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September 2, 2003

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**REPLY COMMENTS OF THE NEW JERSEY
DIVISION OF THE RATEPAYER ADVOCATE**

The New Jersey Division of the Ratepayer Advocate (New Jersey Ratepayer Advocate) herewith submits its Reply Comments in the above-captioned proceeding. As set forth below, these Reply Comments discuss particular issues that were discussed and presented by other parties in their respective Comments. Specifically, these include the relevance of the Triennial Review to the Petition of the Verizon Telephone Companies, Inc. (Petition), and the Comments of ACS of Anchorage, Inc.

I. INTRODUCTION

The Comments in this proceeding reveal the assembly of the parties on familiar battle lines. Verizon Telephone Companies, Inc. (Verizon) counts among its allies

the other Bell Operating Companies (BOCs)¹ and ACS of Anchorage, Inc. (ACS), while state commissions, consumer advocate bodies, and competitive local exchange carriers (CLECs) stand firm at opposite ground to oppose the Petition. The Comments speak for themselves, and the New Jersey Ratepayer Advocate does not endeavor to restate here that which has been set forth by the respective parties. It is sufficient to state that the Comments of other parties support the New Jersey Ratepayer Advocate in several of its positions, including recognition of United States Supreme Court rejection of arguments² that Verizon now makes before the Commission,³ and the fact that general, macro-economic conditions have affected the decreases in telecommunications investment, rather than the implementation of TELRIC-based UNE-P pricing that Verizon claims.⁴ The Ratepayer Advocate also notes that the Commission itself questioned the probative value of cost studies submitted by the BOCs (and CLECs) in the

^{1/} Qwest, BellSouth, and SBC filed on July 31, 2003, a Joint Petition that can be described accurately as a me, too submission. Indeed, the Commission recognized that quality of the Joint Petition, which requests exactly the same relief as Verizon, Joint Petition at 2, when the Commission directed that to the extent that a party files comments on the *Verizon Petition* in WC Docket No. 03-157 and desires to make identical arguments here (in WC Docket No. 03-189), a party may incorporate by reference its comments in WC Docket No. 03-157 in its filing in this docket. See Pleading Cycle Established for Joint Petition of Qwest, BellSouth, and SBC for Expedited Forbearance from the Commission's Current Pricing Rules for the Unbundled Network Element Platform, Public Notice, WC Docket No. 03-189, DA 03-2679 (Aug. 18, 2003).

^{2/} *Verizon Communications, Inc. v. Federal Communications Commission*, 122 S.Ct. 1646 (2002).

^{3/} See Comments of Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc., PacWest Telecomm, Inc., and TDS Metrocomm, LLC, at 45; Telscape Communications at 12, 13, and; WorldNet Telecommunications, Inc., at 5.

^{4/} See Comments of TextraTel f/k/a Southwest Competitive Telecommunications Association at 4, and WorldNet Telecommunications at 6.

Triennial Review proceeding when considering how or whether unbundling affects in investment incentives.⁵ The Commission concluded, Neither the overall levels of competitive LEC activity nor the not insubstantial costs associated with unbundling were generally addressed by either the competitive LECs or the incumbent LECs. ⁶ In light of that conclusion, petitioners for forbearance (such as Verizon)⁷ would be well-advised to distinguish between studies submitted in the Triennial Review proceeding and those offered in support of their petitions.

In these Reply Comments, the New Jersey Ratepayer Advocate will highlight two significant elements of the Comments, collectively, which further support the New Jersey Ratepayer Advocate s position that the Petition should be dismissed or, in the alternative, rejected.

II. PENDENCY OF TRIENNIAL REVIEW.

Many parties to this proceeding cited the Triennial Review proceeding, which is an on-going review of the Section 251 unbundling obligations of incumbent local exchange carriers (ILECs) and implementation of the local competition provisions of the Telecommunications

⁵/ *I/M/O Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability: Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, at para. 178 (rel. Aug. 21, 2003) (Triennial Review Order). The proceedings that are expected to open in the state commissions and at the Federal level as a result of the Triennial Review Order are called, colloquially, the Triennial Review proceeding.

⁶/ *Id.*

⁷/ *See* note 1, *supra*, for description of similarly self-situated parties.

Act of 1996.⁸ The nature of these comments include United States Telecom Association's opinion that forbearance will provide some relief while the Commission reforms TELRIC pricing rules⁹ to National Association of Regulatory Utility Commissioners' cautionary note that consideration of the Petition would be premature.¹⁰ Other parties state, essentially, that consideration of the Petition while the Triennial Review proceeding moves along is unwarranted, unnecessary, and untimely.¹¹

The New Jersey Ratepayer Advocate submits that the mere existence of a proceeding that is either related to or intertwined with the subject matter of a petition for forbearance is insufficient grounds for rejecting or dismissing such a petition. Section 10 of the 1996 Act does not include among its criteria that a petition for forbearance should be denied or dismissed if the subject matter regulations are the topic of then-current Commission inquiry.¹² The New Jersey Ratepayer Advocate notes, however, that the forbearance statute includes an examination of whether continued enforcement or, alternatively, forbearance, is in the public interest, and that

^{8/} The Telecommunications Act of 1996 is cited properly as Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996, will be referred to as the 1996 Act.

^{9/} Comments of United States Telecom Association at 2.

^{10/} Comments of the National Association of Regulatory Utility Commissioners at 1, 2.

^{11/} See, i.e., Comments of Association of Communications Enterprise, Cimco Communications, Inc., and Granite Telecommunications, Inc, at 23, 24; Covad Communications at 1; Florida Public Service Commission at 2; New Jersey Board of Public Utilities at 2; and New York Department of Public Service at 2.

^{12/} The criteria include: (1) enforcement . . . is not necessary to ensure that the charges, practices, classifications, or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement . . . is not necessary for the protection of consumers; and (3) forbearance . . . is in the public interest. 47 U.S.C. § 160.

the existence of a current proceeding addressing the subject matter regulation may implicate that criterion. In short, the existence of a related proceeding is not *prima facie* grounds for dismissing (or granting) a petition for forbearance. Rather, the New Jersey Ratepayer Advocate submits that the Commission may consider the fact that while Verizon is seeking forbearance of UNE-P rules, the Commission and the states are embarking on a process that will shape the future of UNE-P. A dual-track consideration of UNE-P (one to examine forbearance, one to create new parameters) may be an entirely wasteful and unnecessary exercise that is inconsistent with the public interest. So folded into the criteria of Section 10 of the 1996 Act, the existence of an on-going proceeding and its impact on the public interest aspect of the forbearance analysis may be factored into the Commission's decision. By contrast, the mere fact that the proceeding is in progress is not enough to ignore and not act on a petition.

In the instant matter, of course, the New Jersey Ratepayer Advocate maintains its position, as set forth in its Comments, that the Petition must be dismissed or, in the alternative, rejected for having failed to meet any of the prongs of Section 10 of the 1996 Act.

III. AN EXAMPLE OF APPROPRIATE GRANULAR ANALYSIS.

In its initial Comments, the New Jersey Ratepayer Advocate noted several defects of the Verizon petition, which included the lack of appropriate granular analysis. Briefly, the Petition attempted to affect National policy with an inappropriate mix of National and state-specific data. Citing numerous statements of the Commission and Commissioners, the New Jersey Ratepayer Advocate established that Verizon failed to offer an appropriately granular analysis of the

TELRIC UNE-P issue.¹³ Instead, Verizon cobbled together disparate data from various state and National bases in support of its far-reaching and wide-ranging Petition. By contrast, ACS of Anchorage, Inc. (ACS) offered in its Comments a more appropriately granular analysis by offering market-specific data for its service area in Anchorage, Alaska.¹⁴ Without addressing the merits of the ACS petition or the data contained therein, the New Jersey Ratepayer Advocate submits that the ACS petition offers a more appropriate manner of data submission than the Verizon Petition that highlights the failure of Verizon to make a *prima facie* case for further consideration.¹⁵ Since UNE-P rates are set at the state level, a petition for forbearance of TELRIC-based UNE-P prices should be supported a relevant state-by-state market basis, if indeed it can be proven. To the extent that forbearance from TELRIC UNE-P rules could be granted on a state-by-state basis, ACS and other companies that would seek forbearance should submit petitions tailored to their own circumstances, rather than a bootstrap petition that seeks to invoke regulatory policy based upon experience and circumstances in other markets. As

¹³/ Comments of the New Jersey Ratepayer Advocate, § II.B. (This section can be found on pages 11-14 of the original Comments filing of the New Jersey Ratepayer Advocate; on or about August 21, 2003, the original electronic file of the New Jersey Ratepayer Advocate comments was replaced with a duplicate in order to address formatting errors that occurred when the original WordPerfect file was converted to Word, and then to a PDF file. Although the pagination in the second, replacement version changed, the above-cited section can still be located on pages 11-14 of the Comments.)

¹⁴/ See, i.e., *Comments of ACS Anchorage Inc.* at 6-8, 12-17.

¹⁵/ The Ratepayer Advocate notes that ACS attributes the competition that it faces in Anchorage as from competitors who operate *completely without* the use of UNE-P &. *Id.* at 2 (emphasis in original). ACS claims that this competition has devoured 45% of the incumbent's market share, *Id.*, but does not explain the relevance of this facilities-based competition to the instant adverse attitude toward UNE-P.

established in the New Jersey Ratepayer Advocate comments, Verizon failed to establish either local or National justification for forbearance.¹⁶

IV. CONCLUSION.

As set forth in the Comments of the New Jersey Ratepayer Advocate, Verizon's Petition ignores the fact that the Company's challenges to the UNE-P were fully litigated before and subsequently rejected by the Commission¹⁷ and the United States Supreme Court.¹⁸ Verizon is improperly using Section 10 of the 1996 Act to avoid the *res judicata* effects of its failed litigation strategy. Verizon's request for the Commission to abandon its position on UNE-P is contrary to the Commission's announced position in the Triennial Review, wherein the Commission found that UNE-P was presumptively necessary to bring the benefits of competitive alternatives to all consumers.¹⁹ Verizon's claims are unsupported and contradicted by industry experts and economic theory,²⁰ and as noted above, offer inappropriate mixes of National and state data.²¹ Verizon has simply failed to make a *prima facie* case in the first

^{16/} See note 13, *supra*.

^{17/} See, generally, *I/M/O Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Exchange and Commercial Mobile Radio Service Providers: First Report and Order*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15,449 (rel. Aug. 8, 1996) (*First Report and Order*). Appendix A of the First Report and Order lists the commenters in this proceeding, which include Bell Atlantic Telephone Companies and GTE Service Corporation, corporate predecessors to Verizon.

^{18/} *Verizon Communications, Inc. v. Federal Communications Commission*, 122 S.Ct. 1646 (2002) (*Verizon v. FCC*).

^{19/} See FCC Adopts New Rules for Local Network Unbundling Obligations of Incumbent Local Phone Carriers, Federal Communications Commission News Release (Feb. 20, 2003).

^{20/} See Comments of the New Jersey Ratepayer Advocate at 9-11.

^{21/} *Id.* at 11-14.

instance. Therefore, the Petition should be dismissed. In the alternative, the Petition should be rejected for having failed to meet any of the three prongs of the forbearance statute, Section 10 of the 1996 Act.²² Verizon's attempt to revise the manner in which access charges are assessed is likewise defective, and should be dismissed or, in the alternative, rejected.²³

WHEREFORE the reasons stated above and herein, the New Jersey Ratepayer Advocate respectfully recommends that the Commission dismiss the Petition for failure to make a *prima facie* case or, in the alternative, to reject the Petition.

Respectfully submitted,

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RATEPAYER ADVOCATE



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Dated: September 2, 2003

²²/ *Id.* at 14-23.

²³/ *Id.* at 23-26.